

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

05/28/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000864

FILED: _____

STATE OF ARIZONA

GERALD R GRANT

v.

DAVID LEE HALL SR

JOSEPH W CHARLES

NORTH VALLEY JUSTICE COURT
REMAND DESK CR-CCC

MINUTE ENTRY

NORTH VALLEY JUSTICE COURT

Cit. No. 0287509

Charge: A. FAIL TO STOP @ STOP SIGN
B. STOP SIGN VIOLATION CAUSING FATAL INJURY

DOB: 12/05/40

DOC: 05/04/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since its assignment on April 29, 2002. This decision is made within 30 days as

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required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has reviewed the record of the proceedings from the North Valley Justice Court, and the Memorandum submitted by Appellant. Appellee has chosen not to file a Memorandum in this case.

Appellant has included a number of appendices to his memorandum, which are not part of the record on appeal. This Court cannot consider matters which are not part of the record on appeal.

IT IS ORDERED striking all of the appendices from Appellant's Opening Memorandum.

Appellant was found responsible when he and his trial attorney failed to appear at the time scheduled for trial and a default judgment was entered against him. A default was entered pursuant to Rule 26, Rules of Procedure in Civil Traffic cases. This Court notes that the record does not reflect that Appellant ever filed a motion pursuant to Rule 28, Arizona Rules of Procedure for Civil Traffic cases. Of course, the filing of a Motion to Set Aside the Default Judgment is not a prerequisite for an appeal. However, many of the factual issues that are not supported by the record and are argued by Appellant could have been raised in a Rule 28 Motion.¹ Thus, this court may not consider the arguments that are not supported by the record that Appellant's constitutional rights were allegedly violated by the entry of the default judgment against him. This Court must presume that missing portions of the record would support the decision of the trial judge.²

¹ It appears to this Court that a motion pursuant to Rule 28 can still be made pursuant to Rule 28(b), Arizona Rules of Procedure for Civil Traffic cases. This subsection does not contain the 30-day time limit provided for in Rule 28(a). However, Appellant must convince the trial court, if a motion pursuant to Rule 28(b) is made, that granting of his motion is necessary "to prevent a manifest injustice."

² See, State v. Mendoza, 181 Ariz. 472, 891 P.2d 939 (1995); Baker v. Baker, 183 Ariz. 70, 900 P.2d 764 (1995).

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Appellant also argues that the trial court erred in entering the default pursuant to Rule 26(a), Arizona Rules of Procedure in Civil Traffic cases. Appellant argues that the trial judge should have had some type of hearing in his absence before entry of a default judgment would be appropriate. However, Appellant's position is not supported by the language used within the rule. It appears from the rule itself that the court may enter judgment without hearing evidence upon the failure of the Defendant to appear for trial. The rule presumes that the allegation of a traffic complaint shall "be deemed admitted", thus no evidence is necessary.

Finally, Appellant argues that his Notice of Change of Judge was timely filed because he did not know to which judge his case had been assigned for trial, and would not know until the date of the trial. However, the Notice of Change of Judge was denied as untimely by the Justice of the Peace presiding at the North Valley Justice Court. The Honorable Ken Weaver is the judge to whom the case was assigned and the only judge whose name appears on any of the rulings or pleadings. If Appellant had attempted to exercise his Notice of a Change of Judge for a judge other than Judge Weaver, then his arguments would have merit.

This Court also notes in his memorandum at page 9 that Appellant contends that he is "not attempting to circumvent the purpose of this rule (Criminal Rule 10.2).³ Appellant's disclaimer to the contrary, Appellant was specifically attempting to circumvent Rule 10.2 because his sole reason for filing the Notice of Change of Judge was to obtain a continuance or postponement of the trial. Appellant's arguments are, therefore, without merit.

IT IS ORDERED affirming the judgments of responsibility and sanctions imposed by the North Valley Justice Court in this case.

³ Appellant's Opening Brief, at page 9.
Docket Code 512

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IT IS FURTHER ORDERED remanding this matter back to the North Valley Justice Court for all future and further proceedings which may include a Rule 28 Motion by Appellant.